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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM ANDREW HENRY,

Defendant and Appellant.

C067258

(Super. Ct. No.
CM032744)

On January 28, 2010, based upon defendant William Andrew Henry's guilty plea to one count of possession of a controlled substance, the Butte County Superior Court placed him on Proposition 36 probation. Defendant failed the Proposition 36 program and on January 6, 2011, was placed in a drug court program for five years. The court, over defendant's objection,

determined the cost of defendant's supervised probation would be \$164 per month.

Defendant appeals, contending the \$164 per month probation supervision fee must be stricken because (1) there was no determination of his ability to pay that fee, and (2) the court lacked authority to order probation supervision fees based upon a future determination of his ability to pay those fees. The People respond that the probation supervision fee was properly imposed. We reject defendant's positions as being premature.

LAW RELATING TO PROBATION SUPERVISION FEES

Penal Code section 1203.1b governs, among other things, a defendant's payment of the cost of his probation supervision.¹ In pertinent part, section 1203.1b provides: "(b) . . . The court shall order the defendant to pay the reasonable costs if it determines that the defendant has the ability to pay those costs based on the report of the probation officer, or his or her authorized representative. The following shall apply to a hearing conducted pursuant to this subdivision: [¶] . . . [¶] (2) At the hearing, if the court determines that the defendant has the ability to pay all or part of the costs, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability. [¶] . . . [¶] (e) The term 'ability to pay' means

¹ References to undesignated sections are to the Penal Code.

the overall capability of the defendant to reimburse the costs, or a portion of the costs, of conducting the presentence investigation, preparing the preplea or presentence report, . . . probation supervision or conditional sentence, and shall include, but shall not be limited to, the defendant's: [¶] (1) Present financial position. [¶] (2) Reasonably discernible future financial position. In no event shall the court consider a period of more than one year from the date of the hearing for purposes of determining reasonably discernible future financial position. [¶] (3) Likelihood that the defendant shall be able to obtain employment within the one-year period from the date of the hearing. [¶] (4) Any other factor or factors that may bear upon the defendant's financial capability to reimburse the county for the costs."

At the hearing, the court asked the probation officer whether defendant had been evaluated and found suitable for drug court. The probation officer responded that defendant had been evaluated and the probation department would like to have him accepted by the court into the drug court program. The court informed defendant that he would be accepted and requested defendant's counsel to recite the new probation terms applicable.

Counsel recited the terms and requested that several of them be "reserved" because defendant would be in the Salvation Army program for six months and therefore would have no ability to pay. The court granted the request. When it came to the probation supervision term, counsel stated: "I am going to

ask -- this may be a matter of debate, probation supervision fees, court reserve on those. If court is unwilling to do that, they be set at \$164. I would note he has no ability to pay fees at this time, which is why I am asking they be reserved at this time." The court said, "I will reserve ordering payment of those."

Following an unreported bench conference requested by the prosecutor, the following colloquy occurred: "The Court: With respect to fines and fees, the court will order payment of probation supervision fees subject to the caveat that if there is no ability to pay, they might be stayed, and that will come up for consideration at the time you successfully complete all of the terms of your probation. [¶] [Defense Counsel]: Are you setting them at \$164 a month then? [¶] The Court: \$164, is it? That will be \$164 a month during the term of probation." Counsel objected, noting that defendant would be in the Salvation Army program until June 22, 2011, and that he had no current ability to pay.

The court replied: "Certainly you are correct in the statement of the law that he will not be ordered to pay fees that he has no ability to pay. They will be part of the probation order, and he will not be immediately penalized by any revocation of probation for failure to pay those fees, but they may come up at the end of probation in terms of whether or not they are stayed prior to graduation. We will look at his financial circumstances at that time." Counsel repeated his objection "to probation supervision fees, given he's in

residential treatment [and] [c]learly he has no ability [to pay]." The court responded, "Your position is noted for the record, and it certainly seems to be a reasonable position to be taking at this time."

Defendant signed a seven-page form entitled "Terms & Conditions of Formal Probation - Drug Court," in which he acknowledged and agreed to the terms of probation. Page 6 of the form, under the heading "Financial Obligations," sets forth various fines and fees. Under a section on this page entitled "Civil Fees Imposed (Not as a Term and Condition of Probation)" is the entry, "Probation Supervision Fees PC 1203.1b/months x\$164.00." At the bottom of page 6 is a "NOTICE," which includes the following advisement: "You are entitled to a hearing and right to counsel on your ability to pay and the payment amount for probation supervision and public defender fees. I waive my right to such a hearing."

Finally, the last line of page 6 states, "I certify the foregoing is the judgment rendered on the above date by the above named Judge." Page 7 contains defendant's signature and is dated "1/6/2011" beneath the statement that he had received, read, and understood the conditions and orders of his probation.

DISCUSSION

Defendant contends the probation supervision fee of \$164 per month "must be stricken because no determination was made that [he] had the ability to pay as required by the statute." The People respond that defendant waived his right to a hearing on his ability to pay as evidenced by his signing the form,

which included, at the foot of page 6, a notice and waiver of that right.

We do not read the record the same as the parties.

" . . . Penal Code section 1203.1b requires a trial court to order a probationer to pay the cost of probation supervision, provided the probationer has the ability to pay." (*People v. Washington* (2002) 100 Cal.Appl.4th 590, 595.) Here, although the court phrased its setting of the probation supervision fee costs as an "order" that defendant pay those costs, it clearly stated that any payment of the fee would depend upon a determination of defendant's ability to pay, and that determination would be considered at a later date. We understand the court's order to be nothing more than the court simply informing defendant of what the probation costs were and that the court was reserving the issue of determining his ability to pay those costs at a later time. In other words, the court was essentially granting defendant's request for reservation of the probation supervision fees. If defendant should later be aggrieved by the determination of his ability to pay, he may appeal the ruling as an order made after judgment affecting his substantial rights. (See § 1237, subd. (b).) At this point, his complaint is premature.

As to the People's argument that defendant waived his right to a hearing on his ability to pay, defendant's continuing objection to imposition of the fee constituted an implied withdrawal of that waiver.

DISPOSITION

The judgment (order granting probation) is affirmed.

RAYE, P. J.

We concur:

ROBIE, J.

MURRAY, J.